Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

REDWOOD EMPIRE LIFE SUPPORT, a corporation,

Petitioner,

v.

THE COUNTY OF SONOMA, CALIFORNIA, THE SONOMA COUNTY EMERGENCY MEDICAL SERVICES AGENCY and 911 EMERGENCY SERVICES, INC. dba SONOMA LIFE SUPPORT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a "foreseeable result" inquiry a proper part of the "clear articulation" component of state action antitrust immunity analysis where a state legislature has expressly indicated the intended scope of its grant of immunity in the enabling state legislation?

2. Does the "foreseeable result" extension of the "clear articulation" principle of state action antitrust immunity analysis permit a federal court to establish an antitrust immunity based upon an intermediate state court of appeal's reading of a legislatively unexpressed "regulatory deal" into enabling state legislation?

3. Do principles of federalism require the federal courts to allow local governments to use state action antitrust immunity to regulate competition in a way that shifts financial burdens of certain indigent medical care from local to federal government?

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Petitioner and the plaintiff below is Redwood Empire Life Support. The remaining plaintiff below, Stanley P. Cantor, is not a party here because his claims were dismissed before trial.

The Respondents are the County of Sonoma, California, 911 Emergency Services Inc., dba Sonoma Life Support, and the Sonoma County Emergency Medical Services Agency, all defendants below. The remaining defendant below, Mark A. Kostielney is not a party here because Petitioner is not appealing the dismissal at trial court of the claims against him.

Petitioner Redwood Empire Life Support has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Petitioner respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in *Redwood Empire Life Support, et al. v. The County of Sonoma, et al.* Ninth Circuit Nos. 98-15170, 98-15637; USDC No. CV-91-01665-BRW.

OPINIONS BELOW

This petition presents a Judgment of the Ninth Circuit. The Judgment of the District Court granting a permanent injunction is unpublished. (App. B). The opinion of the Ninth Circuit was filed on September 10, 1999 and is certified for publication. (App. A).

STATEMENT OF JURISDICTION

The United States District Court had original jurisdiction over the petitioner's federal antitrust claims pursuant to 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1331. The decision of the United States Court of Appeals for the Ninth Circuit reversing the permanent injunction awarded by the District Court was issued on September 10, 1999. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statutory provision involved in this action is § 1 of the Sherman Act, 15 U.S.C. § 1. The California statutory provisions involved in this action with respect to defendant's claims of state action antitrust immunity are a part of the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("EMS Act"), California Health & Safety Code § 1797-1799.200. The relevant provisions of the California EMS Act have been reproduced in the Appendix hereto at App. C.

STATEMENT OF THE CASE

A. Factual Background

The Petitioner is the plaintiff below, Redwood Empire Life Support ("RELS"), an ambulance service provider with its principal place of business in Sonoma County, California. The defendants below were the County of Sonoma ("County"), and 911 Emergency Services, Inc. dba Sonoma Life Support ("SLS"). The County awarded SLS an exclusive contractual franchise for what those defendants intended to be, and what, after eight years of litigation has now been judicially construed to be, *all ambulance services* within the franchise zone or Exclusive Operating Area ("EOA") of central Sonoma County.

At the time this case was filed in the United States District Court for the Northern District of California in July of 1991, RELS and its predecessors in interest had been in the ambulance service business in central Sonoma County for more than 30 years. On September 12, 1990, the Sonoma County Board of Supervisors voted to issue a Request for Proposals ("RFP") for ambulance and advanced life support services within the central franchise zone of the County. The central franchise zone was designated as the incorporated cities of Santa Rosa, Rohnert Park, Sebastopol, Cotati, and certain contiguous unincorporated areas in Sonoma County. The County solicited alternate bids, one to include, and one to exclude, certain non-emergency ambulance services, because of an express reservation over the existence of a state action antitrust exemption for exclusively franchising the non-emergency services. RELS and SLS both submitted bids. SLS' bid was chosen by a review panel, and the County Board of Supervisors subsequently approved the panel's

recommendation. A final contract between the County and SLS was reached on May 7, 1991, and was set to commence on July 1, 1991.

Before the exclusive franchise contract could be implemented, on May 31, 1991, RELS filed its Complaint, alleging, *inter alia*, a violation of § 1 of the Sherman Act. [*See* "Proceedings in the Courts Below" hereinbelow for the procedural history of this matter after filing]. RELS' antitrust position was at filing, and continues to be, that the EOA created by the County and contractually awarded to SLS was an unreasonable restraint on trade in an economically relevant market, which restraint was broader than the express grant of antitrust immunity contained in the enabling state statute to the extent the EOA purported to include, and thus eliminate competition for, ambulance services other than prehospital emergencies. The state statute in question is entitled the "Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act" (California Health & Safety Code § 1797, *et seq.*, "The EMS Act").

The Sonoma County Board of Supervisors passed two ordinances attempting to support the EOA challenged by RELS. The first was Ordinance No. 4386 which was passed on June 4, 1991. Section 28-21 of that ordinance authorized the Sonoma County Emergency Medical Service Agency to provide for "ambulance services under a local plan which creates one or more exclusive operating areas." Section 28-3(f) defined "ambulance service" as providing an ambulance "for use in emergency service or a situation which has the potential of becoming an emergency." An "ambulance", as used by the County in that ordinance, meant a vehicle "used for responding to emergency calls as defined herein." Section 28-3(c). (App. H).

Ordinance No. 4386 was amended by Ordinance No. 4435, passed on September 10, 1995. Section 1 of Ordinance No. 4435 found that "confusion had arisen" over the scope of regulation intended by Ordinance No. 4386. It further stated that Ordinance No. 4435 was to eliminate ambiguity as to the Board's intent to regulate all ALS services. Section 28-21 was amended to state in part that the local EMS agency "shall provide for emergency LALS and ALS ambulance services under a local plan which creates one or more exclusive operating areas." Amended Section 28-3(c) defines "ambulance" as a vehicle "specially designed, constructed, modified or equipped and used for responding to emergency calls, providing advanced life support services, as defined herein, for the purposes of transporting sick, injured persons." Finally, amended section 28-3(f) further defines an "ambulance service" as an "organization providing an ambulance for use in ALS service, emergency service, or a situation which has the potential of becoming an emergency." (App. H).

The evidence of record in this case is clear that it was the intent of the defendants County and SLS to contractually franchise, on an exclusive basis, all ambulance services within the exclusive franchise zone of central Sonoma County. In fact, it was the express intent of the exclusive franchise to eliminate any existing non-emergency ambulance business. The defendants County and SLS contractually agreed to an exclusive franchise of this breadth even though they were cognizant of a legal issue as to the inclusion of non-emergency ambulance service in an exclusive franchise under the EMS Act.

An *express* reason for the defendants County and SLS to include non-emergency ambulance services in their

contractual exclusive franchise was to enhance the economic viability of SLS' emergency ambulance operations, while at the same time relieving the County of its state law duty to pay for certain emergency medical services rendered to indigents. It was intended by the defendants County and SLS that all competition for non-emergency transports be eliminated, resulting in non-emergency service prices (to private and public insurers) and revenues staying higher, so as to better subsidize SLS' emergency operations. At trial, RELS' expert evidence of an economically relevant market for non-emergency ambulance services ("ambulance services other than pre-hospital emergency services") went uncontradicted by any defense expert.

Counties in California are authorized to develop emergency medical services programs within the auspices of the EMS Act. The stated purpose of the act is to create a state-wide system for emergency medical services, and to promote the development, accessibility, and provision of emergency medical services to the people of the state. California Health & Safety Code §§ 1797.1, 1797.5. Counties implementing a program under the EMS Act must designate a local EMS agency that will be responsible for the administration of the county's program, including emergency ambulance and paramedic services. (App. C, pg. 20a).

The local EMS Agency was delegated a narrow scope of power under the EMS Act. Local EMS agencies are limited to planning, implementing and evaluating the emergency medical systems, and being responsible for the implementation of advanced life support and the implementation of training programs. The state EMS Authority must review the local EMS plan, and determine whether it is consistent with the EMS Act, and any

regulations and/or guidelines promulgated by the state EMS Authority. Moreover, only the EMS Authority has the power to adopt such rules and regulations as may be reasonable and proper to carry out the purposes and intent of the Act. (App. C, pgs. 24a, 25a).

In 1984, after, and with express reference to, this Court's decision in *Community Communications Company v. City of Boulder*, 455 U.S. 40, 53-54 (1982), the California state legislature enacted amendments to the EMS Act going directly to the grant of state action antitrust immunity intended by the Act. In enacting California Health & Safety Code §§ 1797.6, 1797.85 and 1797.224 (App. C, pgs 20a, 23a, 26a-27a) the state legislature took the opportunity to articulate precisely what anticompetitive activities of local government were intended to be immunized pursuant to the *City of Boulder* ruling. There is absolutely no mention in these sections of any immunity for the creation of exclusive operating areas for ambulance services other than various forms of prehospital emergency ambulance services. Likewise, there is no mention of immunity for: (1) any regulatory "deal" to support emergency services with non-emergency revenues; or (2) interference with competition in the nature of creating subsidies paid by private insurers and federal medical programs to lessen the burden on California counties of their obligation to pay for emergency medical services provided to indigents.

B. Proceedings in the Courts Below

Plaintiff's Complaint was filed on May 31, 1991. The only one of RELS' several claims relevant to this petition is the federal antitrust claim under § 1 of the Sherman Act.

On June 14, 1991, the United States District Court, Honorable Robert Peckham, granted RELS' motion for a Temporary Restraining Order that prevented the enforcement of the County/SLS exclusive franchise agreement except for "situations in which an individual has need for immediate medical attention or where the potential for such need is perceived by emergency medical personnel or a public safety agency." On July 3, 1991, the TRO was modified to clarify RELS' ability to use ambulances for non-emergency transportation.

On August 2, 1991 the United States District Court, Honorable Robert Peckham, granted RELS' motion for a preliminary injunction, and enjoined the defendants from:

> enforcing Ordinance 4386 to prevent the plaintiff or others similarly situated from providing non-emergency medical transportation as defined in Title 22 Section 51151.7 of the California Code of Regulations at the request of any physician or medical facility requesting same on behalf of a patient under the medical care and attention of such physician or medical facility.

Defendants appealed Judge Peckham's grant of the preliminary injunction, relying on the sole defensive ground of state action antitrust immunity. On January 29, 1993 the preliminary injunction was affirmed by the Ninth Circuit Court of Appeals in an unpublished disposition. The parties, and indeed much of the ambulance industry in the state of California, operated under Judge Peckham's preliminary injunction for more than six years from August 6, 1991 until Judge Walker's final Judgment after trial in this matter on December 22, 1997, without any catastrophe or policy crisis

in patient service or system funding ever being laid at the door of the "competition in non-emergency services" status quo being maintained by the RELS injunction.

In September, 1995 the case was tried without a jury to the Honorable Vaughn R. Walker, District Judge. Judge Walker initially entered judgment against RELS on its Sherman Act § 1 claim pursuant to F.R.C.P. 54(b) on August 12, 1996, after, and with express reference to, the Ninth Circuit's issuance of its original opinion in *A-1 Ambulance Service Inc. v. County of Monterey et al.* at 83 F.3d 298. After the Ninth Circuit's issuance of an amended opinion in *A-1 Ambulance*, 90 F.3d 333 (9th Cir. 1996) Judge Walker granted, by order dated October 23, 1996, RELS' timely motion pursuant to F.R.C.P. 59, and vacated his previous judgment of August 12, 1996.

After considering additional post-trial briefing and oral argument on specific issues identified in his order of October 23, 1996 Judge Walker entered Judgment granting a permanent injunction on December 22, 1997. The District Court permanently enjoined the defendants from:

> contractually granting or otherwise maintaining or enforcing a contractually granted exclusive operating zone or zones . . . which prevents plaintiff Redwood Empire Life Support, or others similarly situated, from providing, at the request of any physician or medical facility requesting same on behalf of a patient under the medical care and attention of such physician or medical facility, non-emergency ambulance services at a basic life support level of service that does not involve

> provision by an EMT-P or EMT-II of an advanced life support or limited advanced life support level of service as such levels of service are defined by or pursuant to California Health & Safety Code § 1797.52 and 1797.92 respectively.

In short, the District Court maintained its position, as previously articulated in Judge Peckham's preliminary injunction, that the defendants could not lawfully maintain and enforce *an EOA for all ambulance services* given the lesser scope of the grant of antitrust immunity expressly set forth in the EMS Act.

The defendants appealed to the United States Court of Appeals for the Ninth Circuit, relying on the sole argument of state action antitrust immunity, the same grounds upon which those defendants had unsuccessfully attacked Judge Peckham's granting of a preliminary injunction some six-and-a-half years prior. After regularly scheduled briefing before the Ninth Circuit was concluded, the Ninth Circuit issued a request for special supplemental briefing on the impact, if any, of the decision of the California Court of Appeal in *Schaefer's Ambulance Service v. County of San Bernadino*, 68 Cal. 4th 581, 80 Cal. Rptr. 2d 385 (CCA 4th Dist., 1998). At that time the California Supreme Court had not, and to this date has not, issued a decision providing a judicial "clear articulation" of the scope of state action immunity conferred by the 1984 amendments to the EMS Act.

After oral argument, the Ninth Circuit, with express and heavy reliance on the state intermediate court of appeal's decision in *Schaefer, supra*, issued its decision reversing Judge Walker's permanent injunction in a published opinion

dated September 10, 1999. The Ninth Circuit held that the competitive restraints embodied in the challenged EOA, and a "regulatory deal" (App. A, pg. 14a) to support emergency ambulance service franchisees with revenues from non-emergency ambulance services, were protected by the doctrine of state action antitrust immunity, in that the inclusion of all ambulance services in an EOA was the logical and foreseeable result of the EMS Act's grant of antitrust immunity for exclusive operating areas for emergency medical services. As a part of the analysis purporting to support this conclusion, the Ninth Circuit cited its own 1986 decision in *Mercy-Peninsula Ambulance Inc. v. County of San Mateo*, 791 F.2d 755 (9th Cir. 1986) for the sweeping proposition that "[v]irtually any anti-competitive effect . . . would appear to be within the EMS Act's contemplation."

The judgment of the District Court setting forth the permanent injunction appealed from, and the decision of the Court of Appeals for the Ninth Circuit, have been included in the Appendix.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because questions fundamental to the application of the doctrine of state action antitrust immunity are proliferating in the federal courts, because the Ninth Circuit decision in this case conflicts with important Supreme Court precedent, and because state action antitrust immunity needs revisiting where local governments have a parochial financial interest in limiting competition.

I.

THERE ARE QUESTIONS CONCERNING THE "CLEAR ARTICULATION" COMPONENT OF STATE ACTION ANTITRUST IMMUNITY ANALYSIS ARISING OUT OF MULTIPLE FEDERAL CIRCUITS AND CURRENT LEGAL COMMENTARY.

In filing this petition, petitioner is mindful of the pending petitions for writs of certiorari in *Hospital Service District No. 1 of Tangipahoa Parish, et al. v. Surgical Care Center of Hammond* (5th Cir.; Supreme Court Docket No. 99-210) and *Omega Homes Inc. v. City of Buffalo* (2nd Cir.; Supreme Court Docket No. 99-134). All of these petitions are directed to inducing this court to examine the inconsistent and confusing application of the "clear articulation"/"foreseeable result" components of state action antitrust immunity analysis in the federal courts. These requests for re-examination of a legal doctrine at the heart of federalism come in a term when this Court is evincing a strong interest in issues touching upon the relationships between federal and state governments.

In deference to the competing interests of completeness and avoidance of duplication, RELS joins in those sections of the pending *Hospital Service District No. 1 of Tangipahoa Parish* and *Omega Homes Inc.* petitions that describe an existing conflict among and between various of the federal circuit courts of appeal in the application of the state action antitrust immunity doctrine. (*See Hospital Service District No. 1 of Tangipahoa Parish* petition at pages 21-28; *Omega Homes Inc.* petition at pages 9-13). In fact, this conflict and confusion in state action antitrust immunity jurisprudence has attracted the attention of legal commentators.

The 1999 edition of the *Antitrust Law Handbook* by William C. Holmes (West Group Antitrust Law Library) updates developments in state action antitrust immunity law by commenting that "appellate court decisions that appeared during the past year reflect arguably divergent views on how broadly the conditions for state action immunity are to be interpreted." The commentary then proceeds to analyze decisions of the Fifth and Tenth Circuits[1] as contrasting examples of "a very broad interpretation of state action immunity" and "a much narrower interpretation of the 'clear articulation' prong." The commentator observes that the Fifth Circuit opinion "failed to address a seeming inconsistency in its logic" with respect to the "clearly articulated state policy prong", and that "if correct, the 5th Circuit position arguably reads the 'clear articulation' prong right out of the test." W. Holmes, *Antitrust Law Handbook* (West, 1999 Edition) at 219-224. In short, the extant analytical problems with this important area of federal law do not just exist in the minds of advocates with a position to champion.

II.

THE NINTH CIRCUIT'S DECISION IN THIS CASE IS ERRONEOUS AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

It is a fundamental premise of state action antitrust immunity law that even where a state enabling statute contemplates certain anticompetitive actions, the protection of state action antitrust immunity is lost where an

1. *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998); *Hallco Environmental Inc. v. Comanche County Board of County Commissioners*, 149 F.3d 1190 (10th Cir. 1998).

anticompetitive scheme is extended or exploited in a manner not contemplated by the enabling state legislation. *City of Lafayette v. Louisiana Power & Light Co.* 435 U.S. 389, 417 (1978). In other words, this legal analysis is not properly in the nature of an "all or nothing" inquiry. It is difficult to square this tenet of this Court's state action antitrust immunity jurisprudence with the Ninth Circuit's reading of the California EMS Act to immunize "virtually any anticompetitive effect", especially where the enabling legislation expressly states the scope of the immunity it intends *without including the species of restraint challenged in this case.*

Section 1797.6(b) of the California EMS Act (App. C, pgs. 20a-21a) is the California state legislature's articulation of the scope of the antitrust immunity it intends to confer. Given the rule from *City of Lafayette* set forth in the previous paragraph, how can the Ninth Circuit possibly make a finding, as it did in this case, that the legislature contemplated the immunization of "virtually any anticompetitive effect?" Put simply, this is changing the "foreseeable result" test into an authorization to rewrite legislation. The legislature of the state of California was expressly cognizant of this Court's holding of *Communications Co. v. City of Boulder, supra,* when it amended the EMS Act in 1984 to specifically address the state action antitrust immunity issue for *emergency* ambulance services. California Health & Safety Code §§ 1797.6, 1797.85, 1797.224, (App. C, pgs 20a-21a, 23a, 26a-27a). To judicially rewrite these legislative provisions to provide an immunity for "virtually any anticompetitive effect", specifically anticompetitive effects in a separate economically relevant market like the market for non-emergency ambulance services, cannot be reconciled to *City of Lafayette, supra.*

The Ninth Circuit expressly relied on this Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) for its application of the "foreseeable result" test in this case. There is a critical difference between *Town of Hallie*, *supra*, and *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991) as "foreseeable result" precedents and the instant case. In this case, there is a clear and express statement in the enabling state legislation of the intended scope of state action antitrust immunity. There is no analog to California Health & Safety Code § 1797.6(b) in *Town of Hallie* or *City of Columbia*. Accordingly, there is arguably no need for a court to deliberate on what a legislature might have intended to be the foreseeable scope of its grant of immunity when the legislature has expressly indicated what it intends.

There is yet another important aspect in which the instant case is distinguishable from the "forseeable result" analyses of *Town of Hallie* and *City of Columbia*. Both latter cases require that federal courts first identify the regulatory powers granted by the enabling state statute, *and the specific jurisdictional areas for the exercise of those powers*, in evaluating a particular claim of state action antitrust immunity. The Wisconsin statutes in *Town of Hallie* and the South Carolina statutes in *City of Columbia* granted regulatory powers to specific local governments, in those cases cities, in specific geographic areas where the cities had jurisdiction. This Court found that the power conferred by the state in those cases was being exercised *by the proper entity in the proper area* before it turned to the question of whether the particular use of regulatory power being challenged was a "foreseeable result" of the legislative grant of regulatory power in question.

Neither the Ninth Circuit decision below, nor any California state court, has adequately addressed this point of what local government entity got the power to regulate competition in what geographical area under the EMS Act. The California statutory scheme confers discretionary power on an EMS agency, and to a lesser extent, a county, to create exclusive operating areas within the "EMS area" of the local EMS agency. The "EMS area" itself is limited by statute to the geographic areas of the county and those cities which expressly agree, through so-called joint powers agencies, to participate. (California Health & Safety Code § 1797.200).

Of importance to the analysis of what regulatory power was legislatively conferred on what local government entity in this case, is the fact that, contemporaneous with the 1984 amendments to the EMS Act that expressly set forth the scope of intended state action antitrust immunity, the legislative definition of "EMS Area" was changed to make clear that an EMS Area could be something different than simply the geographical area of a county. (California Health & Safety Code § 1797.74, 1980 and 1984 versions). (App. D, E). The implication, in terms of a "what governmental entity got what power" analysis, is that cities were recognized as potentially having different interests than counties in the development of emergency medical services systems.

The relevance of these points in the instant case is that the "regulatory deal" extolled by the Ninth Circuit below (App. A, pg. 14a) makes some policy assumptions about the "foreseeable results" of the legislature's very specific grant of immunity. The Ninth Circuit seems to assume that the legislature intended to have non-emergency ambulance service users in populous areas financially support emergency ambulance services in less populous or less

affluent areas. This assumption raises the question of whether a city, as a party to a joint powers agreement creating a local EMS agency, would agree to have its residents overcharged for non-emergency services in order to help a county pay for emergency services to indigents who may live in unincorporated areas or in other cities in the county. The Ninth Circuit's decision, and the intermediate state Court of Appeal *Schaefer* decision upon which it expressly relies, are both deficient in that they undertake a "foreseeable result" inquiry without first clearly ascertaining whether the "regulatory deal" they envision is consistent with the actual legislatively granted powers of all of the local governmental entities that have interests on the table in the structuring of an emergency medical services system.

In its expansive reading of the anticompetitive results that were "foreseeable" extensions of the EMS Act's grant of antitrust immunity, the Ninth Circuit acknowledged and blessed a "regulatory deal" divined in the EMS Act by an intermediate California State Court of Appeal. This "regulatory deal" construes the EMS Act to permit exclusive emergency ambulance service operators to exclusively perform non-emergency services that provide a stable source of income to offset the less predictable income derived from 911 emergency responses. There is absolutely no mention of this "regulatory deal" anywhere in the text of the EMS Act, much less in those provisions expressly enacted to set forth the scope of intended state action antitrust immunity. Who voted for this "deal"? What are the rest of its terms, if any?

It is respectfully submitted that a federal court's adoption of a state intermediate Court of Appeals judicial construction of such a "regulatory deal" as part of the recognition of an

antitrust immunity is an abdication of an important federal law responsibility. It is well settled that exemptions and immunities from the federal antitrust laws are to be strictly construed and narrowly granted. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981). Does federalism require that intermediate state courts of appeal be allowed to grant immunities from federal antitrust law, even where the construed scope of the immunity exceeds the express grant in the enabling legislation? At the very least, should not the federal courts require the construction of an enabling statute by the *highest court of a state judicial system* before such a construction is imported into federal law as an antitrust immunity?

III.

THIS CASE PRESENTS AN IMPORTANT, BUT AS YET JUDICIALLY UNDERDEVELOPED, LEGAL ISSUE CONCERNING THE EXTENSION OF STATE ACTION ANTITRUST IMMUNITY TO A LOCAL GOVERNMENT WITH A FINANCIAL INTEREST, INIMICAL TO THE FINANCIAL INTEREST OF THE FEDERAL GOVERNMENT, IN LIMITING COMPETITION.

This Court has previously recognized that the role of a local government needs to be analyzed differently for the purposes of state action antitrust immunity where the government body acts other than in a purely regulatory capacity. *City of Columbia*, *supra*, 499 U.S. at 1351-52. This sensitivity is analytically related to this Court's long insistence that essentially commercial interests cannot be immunized from antitrust scrutiny by a "gauzy cloak" of governmental involvement. Specifically, this Court has

indicated that for the purposes of state action antitrust immunity analysis some danger must be recognized that a local government entity may "seek to further purely parochial public interests at the expense of more overriding state goals." *Town of Hallie, supra*, 471 U.S. at 47. In the instant case, there is a serious question of whether the defendant County of Sonoma wants to expand the scope of the EOA in question, through the "regulatory deal" adopted by the Ninth Circuit below and the state court *Schaefer* decision upon which the Ninth Circuit relied, in order to shift some of the cost of emergency ambulance services away from the County and to third party payors for non-emergency ambulance services such as private insurers and the federal Medicare program. (*See* Report of Inspector General, 11/97, on Medicare Ambulance Payments, App. I).

Under California law, counties bear the expense of emergency ambulance services for indigents. *City of Lomita v. County of Los Angeles*, 148 Cal. App. 3d 671, 674, 196 Cal. Rptr. 221, 223 (1983). Under the "regulatory deal" that the Ninth Circuit has blessed in its opinion below, substantial revenues from non-emergency ambulance services included in an EOA are used to subsidize the expense of providing emergency ambulance services. The evidentiary record below established that such inclusion of non-emergency ambulance services in the EOA tends to keep charges for non-emergency services higher to the payors for those services, including private insurers and the federal Medicare program. Under the "regulatory deal", these artificially elevated non-emergency service revenues enabled SLS, the exclusive franchisee, to provide emergency ambulance services to County- responsible patients at below market rates. In short, the non-emergency payors, including the federal government through Medicare, pay more in a market without competition

so that the County can pay less for emergency services for which it is responsible under state law. *The County has a parochial financial reason for wanting a broad EOA.* The "regulatory deal" that protects the county's financial interest in paying as little as it can for emergency ambulance services for indigents costs the federal government more money.

CONCLUSION

An important rule of federal law, going to the heart of relationships between state and federal government, is being inconsistently and illogically applied, and is drifting from this Court's precedents. Accordingly, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED SEPTEMBER 10, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REDWOOD EMPIRE LIFE SUPPORT, a corporation; STANLEY P. CANTOR,
Plaintiffs-Appellees,

v.

THE COUNTY OF SONOMA; THE SONOMA COUNTY EMERGENCY MEDICAL SERVICES AGENCY; MARK A. KOSTIELNEY; 911 EMERGENCY SERVICES, INC., dba SONOMA LIFE SUPPORT,
Defendants-Appellants.

Nos. 98-15170
98-15637

D.C. No.
CV-91-01665-VRW

OPINION

Appeals from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
June 18, 1999—San Francisco, California

Filed September 10, 1999

Before: Mary M. Schroeder, Betty B. Fletcher, and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Antitrust/Sherman Act

The court of appeals reversed a judgment of the district court. The court held that under California's Emergency Med-

ical Services System and the Prehospital Emergency Medical Care Personnel Act (EMS Act), state action immunity from antitrust liability applies to a county's exclusive contract with a provider of all levels of ambulance services.

Within the framework of the EMS Act, California counties are authorized to develop emergency medical services programs. When a county does so, it must designate a local EMS agency that will be responsible for the administration of the program, including ambulance and paramedic services. The statute allows a local EMS agency to create exclusive operating areas for emergency ambulance services or providers of advanced life support (ALS) or limited ALS.

In enacting the EMS Act, the California Legislature intended to confer state action immunity from federal antitrust laws for actions taken by local governmental entities under the statute. So long as a local EMS agency creates an exclusive operating area for services consistent with those described in the statute, the agency's action will not be subject to federal antitrust laws.

The Board of Supervisors of appellant County of Sonoma enacted ordinances authorizing the creation of exclusive operating areas within the County, and designating the County Public Health Department (Agency) to serve as the local EMS agency. The ordinances authorized the Agency to develop an exclusive operating area in which all three types of services specified in the EMS Act are offered: emergency ambulance service, ALS, and limited ALS.

Basic life support (BLS) is a subset of ALS comprising first aid and cardiopulmonary resuscitation. Limited ALS consists of techniques exceeding basic life support, but not reaching the level of ALS. Sonoma County's ordinance required that all ambulances within the exclusive operating area provide limited ALS services.

Appendix A

The County created an "exclusive franchise zone" covering an area in which only one provider would be allowed to provide ambulance services. In a competitive bidding process, the Agency awarded a contract for exclusive ambulance services for this zone to appellant Sonoma Life Support. Appellee Redwood Empire Life Support was an unsuccessful bidder.

The County notified Redwood that it could not continue to provide ambulance services in the exclusive operating area, and denied Redwood's request for a permit to provide non-emergency ambulances services on the ground that in the exclusive operating area, only Sonoma Life Support was entitled to an emergency ambulance permit. However, the County told Redwood that it could operate non-emergency vehicles like gurney cars and wheelchair vans within the exclusive operating area.

Redwood sued the County and Sonoma Life Support, alleging that the contract with Sonoma Life Support was not immune from federal antitrust laws insofar as it purported to grant an exclusive franchise in non-emergency interfacility transfers of patients.

The district court granted a preliminary injunction prohibiting the County from implementing the contract as to non-emergency medical transportation. The court of appeals affirmed.

Citing *A-1 Ambulance Service, Inc. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996), the district court dismissed Redwood's antitrust claims. *A-1 Ambulance* held that an exclusive provider of ALS ambulance services could engage in non-emergency interfacility transportation, even though ALS services typically are used for emergency responses. The district court concluded that the exemption from antitrust laws covered the County's contract with Sonoma Life Support, including the provision of non-emergency transportation, because

all of Sonoma Life Support's ambulances were required to provide an ALS level of service.

On Redwood's motion and citing a footnote in *A-1 Ambulance*, the district court amended its judgment to enjoin the County from enforcing the contract with Sonoma Life Support to the extent that it prevented Redwood from providing non-emergency ambulance services at a basic life support level of service. The County and Redwood Life Support appealed.

After the district court issued a permanent injunction, the California Court of Appeal decided *Schaefer's Ambulance Service v. County of San Bernardino*. Interpreting the EMS Act, the court held that a county can establish an exclusive operating area for emergency ambulance services that encompasses all services rendered by emergency ambulances. The court did not limit the scope of the statute to the provision of ALS services.

[1] Section 1 of the Sherman Act declares that every contract in restraint of trade is illegal. This law applies to local governments. If the County's contract granting a monopoly to Sonoma Life Support for ambulance services was subject to § 1, it was an illegal restraint of trade. But the contract was not subject to the Sherman Act if it was authorized by state law and hence protected by the state action immunity.

[2] Under the state action immunity doctrine, a local government may restrict trade without violating the antitrust laws if the state has clearly articulated and affirmatively expressed its intention to allow the municipality to replace competition with regulation of monopoly power. California has clearly articulated its intention to grant state action immunity to local governments that implement emergency medical services plans that are consistent with the EMS Act. So long as the County's contract with Sonoma Life Support established an exclusive operating area for services contemplated by the EMS Act, it was immune from federal antitrust laws.

[3] *A-1 Ambulance* did not decide that non-emergency BLS ambulance services would fall outside the immunity provisions of the EMS Act. The court had no need to consider the propriety of exclusive operating areas for BLS ambulance services. The issue was left unresolved by the court. It was essentially an issue of state statutory interpretation.

[4] The reasoning of *Schaefer's* materially undercut Redwood's position. *Schaefer's* concluded that "emergency ambulances" can perform non-emergency interfacility transfers within an exclusive operating area under the EMS Act. Noting that the EMS Act does not define "emergency ambulance services," *Schaefer's* implicitly accepted that a county can establish an exclusive operating area within which the exclusive operator provides non-emergency BLS ambulance services.

[5] The *Schaefer's* court observed that the EMS Act contemplates a regulatory "deal" in which an exclusive operator receives protection from competition in profitable areas of a county in exchange for the obligation to serve unprofitable areas. As part of this deal, the EMS Act permits exclusive operators to perform non-emergency services that provide a stable source of income to offset less predictable income derived from 911 responses.

[6] The *Schaefer's* court also adopted the argument that carving out interfacility transfers from an exclusive operating area would pose serious enforcement problems, and allowing non-exclusive operators to provide ambulance services in non-emergency situations would require a particularized evaluation of a patient's medical needs before each ambulance run. The court reasoned that the legislature wanted to avoid this undesirable result, and authorized that the scope of an exclusive operating area depended on the nature of the ambulance providing the services.

[7] Sonoma County's ordinances and its contract with Sonoma Life Support were protected by state action immunity. Because Sonoma Life Support provided ALS service, it

was entitled exclusively to perform non-emergency interfacility transfers at an ALS level of service.

[8] The EMS Act is a clearly expressed state policy to create exclusive operating areas for emergency ambulance services. **[9]** A state legislature need not explicitly authorize a municipality to engage in anticompetitive conduct to confer antitrust immunity. Rather, the state legislature satisfied the "clear articulation" requirement when the logical and foreseeable result of a statute is to displace competition either with regulation or monopoly.

COUNSEL

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Richard P. Hill, Moody & Hill, San Francisco, California, for the plaintiffs-appellees.

OPINION

SCHROEDER, Circuit Judge:

This case requires us again to consider the scope of state action immunity from the federal antitrust laws conferred by California's Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("EMS Act"). Cal. Health & Safety Code §§ 1797-1799.200. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755 (9th Cir. 1986). Appellee Redwood Empire Life Support ("Redwood") brought this antitrust action against Sonoma County and 911 Emergency Services, Inc., d/b/a Sonoma Life Support. Redwood challenged the

County's exclusive contract with Sonoma Life Support to provide ambulance services, including non-emergency transports, in central Sonoma County.

The district court issued a permanent injunction against Sonoma County because it concluded that the EMS Act did not contemplate exclusive contracts for non-emergency ambulance services at a basic life support ("BLS") level of service. With the guidance of an intervening decision of the California courts interpreting the statute, *Schaefer's Ambulance Service v. County of San Bernardino*, 80 Cal. Rptr. 2d 385 (Ct. App. 1998), *review denied*, March 31, 1999, we now reverse and hold that the statute authorizes exclusive franchises covering all levels of service provided by ambulances.

FACTS

A. Background

Counties in California are authorized to develop emergency medical services programs within the auspices of the EMS Act. *See* Cal. Health & Safety Code §§ 1797-1799.200. Counties implementing a program under the EMS Act must designate a local EMS agency that will be responsible for the administration of the county's program, including ambulance and paramedic services. The EMS Act permits a local EMS agency to create one or more exclusive operating areas for "emergency ambulance services or providers of limited advanced life support or advanced life support." Cal. Health & Safety Code §§ 1797.85, 1797.224 (West 1990).[1]

---

[1]The material portions of the EMS Act provide as follows:

> A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan.

Cal. Health & Safety Code §1797.224.

Appendix A

Section 1797.6(b) of the EMS Act explains that the California Legislature, by enacting sections 1797.85 and 1797.224, intended to confer state action immunity from federal antitrust laws for actions taken by local governmental entities under the EMS Act. Therefore, so long as a local EMS agency creates an exclusive operating area for services consistent with those described in § 1797.85, the agency's action will not be subject to federal antitrust laws. *See Mercy-Peninsula*, 791 F.2d at 758.

The Sonoma County Board of Supervisors enacted two ordinances that authorized the creation of exclusive operating areas in Sonoma County and designated the Sonoma County Public Health Department to serve as the local Emergency Medical Services Agency ("the Agency"). The ordinances authorized the Agency to create an exclusive operating area in which all three types of services specified in § 1797.85 of the EMS Act are offered: emergency ambulance services, advanced life support ("ALS") and limited ALS. Advanced life support incorporates various techniques for emergency medical care including cardiopulmonary resuscitation, cardiac defibrillation and intravenous therapy. *See* Cal. Health & Safety Code § 1797.52. Basic life support, which Redwood contends is not covered by §1797.85, is a subset of ALS comprising emergency first aid and cardiopulmonary resuscitation. *See id.* § 1797.60. Limited ALS consists of techniques exceeding basic life support, but less than ALS. *See id.* § 1797.92. Sonoma County's ordinance required that all ambulances within the exclusive operating area provide a limited ALS service.

"Exclusive operating area" means an EMS area or subarea defined by the emergency medical services plan for which a local EMS agency, upon the recommendation of a county, restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support.

Id. §1797.85.

The County adopted an "exclusive franchise zone" covering a portion of Sonoma County in which only one provider would be allowed to provide ambulance services. In accordance with the EMS Act and the County's ordinances, the Agency initiated a competitive bidding process for the selection of the exclusive ambulance services provider for this zone. The County awarded the contract to Sonoma Life Support. Plaintiff Redwood, which had previously provided emergency and nonemergency services in the county, was an unsuccessful bidder.

Following the contract award to Sonoma Life Support, the County notified Redwood that it could not continue to provide ambulance services in the exclusive operating area. Furthermore, the County denied Redwood's request for a permit to provide "non-emergency ambulance services" because the County's ordinances authorized the issuance of ambulance permits to operators of emergency ambulances that respond to 911 calls. In the exclusive operating area, only Sonoma Life Support was entitled to an emergency ambulance permit. Consequently, the County informed Redwood that it could operate "non-emergency vehicles," such as "gurney cars and wheelchair vans" within the exclusive operating area. These vehicles are not routinely equipped with the medical equipment and personnel required for the specialized care offered by ambulances. *See* Cal. Code Regs. tit. 22, §§ 51151.3, 51151.5 (defining "litter van" (similar to a gurney car) and "wheelchair van" for the purposes of Medi-Cal program).

B. Procedural History of this Litigation

In 1991, Redwood filed suit against Sonoma County and Sonoma Life Support, alleging that the County's exclusive contract with Sonoma Life Support is not immune from federal antitrust laws insofar as it purports to grant an exclusive franchise in non-emergency interfacility transfers. Non-emergency interfacility transfers involve the transportation of a patient from one health care facility, such as a hospital or

nursing home, to another. The district court issued a preliminary injunction precluding the County from implementing the contract as to "nonemergency medical transportation as defined in Title 22 § 51151.7 of the California Code of Regulations." The preliminary injunction was affirmed by this court in an unpublished disposition.

After a trial, the district court dismissed Redwood's antitrust claims by relying on this court's decision in *A-1 Ambulance Service, Inc. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996). In *A-1 Ambulance*, we held that an exclusive provider of ALS ambulance services can engage in nonemergency interfacility transportation, even though ALS services typically are used for emergency responses. Following the reasoning of *A-1 Ambulance*, the district court concluded that the exemption from the antitrust laws covered Sonoma County's contract with Sonoma Life Support, including the provision of non-emergency transportation, because all of that company's ambulances are required to provide an advanced life support level of service.

Redwood filed a motion to amend the district court's judgment on the antitrust issue. Pointing to Footnote 1 of the *A-1 Ambulance* opinion, Redwood argued that the district court had failed to consider that Sonoma County's exclusive operating area also incorporates BLS ambulance services. Footnote 1 states that:

> Nothing in this opinion should be read to imply that EMS agencies may establish exclusive operating areas for basic life support ambulance service.

A-1 Ambulance, 90 F.3d at 335 n.1.

The district court requested the parties to brief whether Sonoma County had created an exclusive operating area for "basic life support ambulance service" as that term is used in *A-1 Ambulance*. The district court then granted Redwood's

motion and issued a permanent injunction against the County prohibiting enforcement of the contract with Sonoma Life Support to the extent that the contract prevents Redwood from providing "non-emergency ambulance services at a basic life support level of service."

The district court awarded Redwood its costs of suit and attorney's fees in the amount of $47,243.25 under 15 U.S.C. § 26.

ANALYSIS

I.

[1] Section 1 of the Sherman Act declares that every contract "in restraint of trade" is illegal. *See* 15 U.S.C. § 1. This law applies to local governments. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978). If the County's contract granting a monopoly to Sonoma Life Support for ambulance services in central Sonoma County is subject to § 1 of the Sherman Act, it is an illegal restraint of trade. But the contract is not subject to the Sherman Act if it is authorized by state law and hence protected by state action immunity, a doctrine first recognized in *Parker v. Brown*, 317 U.S. 341 (1943).

[2] Under the state action immunity doctrine, a local government may restrict trade without violating the antitrust laws if the state has "clearly articulated" and affirmatively expressed its intention to allow the municipality to replace competition with regulation or monopoly power. *A-1 Ambulance*, 90 F.3d at 336 (citing *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 372 (1991)). This court previously has held that California has "clearly articulated" its intention to grant state action immunity to local governments that implement emergency medical services plans that are consistent with the terms of the EMS Act. *See Mercy-Peninsula*, 791 F.2d at 758; *see also* Cal. Health & Safety

Code § 1797.6(b). Therefore, so long as the County's contract with Sonoma Life Support establishes an exclusive operating area for services contemplated by the EMS Act, it is immune from federal antitrust laws. Because the district court's decision to grant an injunction relies on the interpretation of a state statute, we review de novo. *A-1 Ambulance*, 90 F.3d at 335.

Sonoma County argues that its exclusive operating area falls squarely within the EMS Act because the Act authorizes a single provider to offer ALS and emergency ambulance services. Redwood responds that the County's ALS requirement effectively prohibits providers other than Sonoma Life Support from offering non-emergency BLS ambulance service in the exclusive operating area because ALS subsumes a BLS level of service. Redwood asserts that this monopoly in BLS ambulance services is not immune from the antitrust laws because the EMS Act covers only emergency services and services provided at an ALS level.

[3] Relying upon this court's reservation in Footnote 1 of the *A-1 Ambulance* opinion, the district court agreed with Redwood's reasoning. Yet, *A-1 Ambulance* did not decide as a matter of law that a monopoly in non-emergency BLS ambulance services would fall outside the immunity provisions of the EMS Act. Footnote 1 explains only that the court had no need to consider the propriety of exclusive operating areas for BLS ambulance services. *A-1 Ambulance*, 90 F.3d at 335 n.1. The issue was left unresolved by the *A-1 Ambulance* court. It is essentially an issue of state statutory interpretation.

After the district court issued the permanent injunction in this case, the California Court of Appeal decided *Schaefer's Ambulance Service v. County of San Bernardino*, 80 Cal. Rptr. 2d 385 (App., 1998). Interpreting the EMS Act, *Schaefer's* held that a county can establish an exclusive operating area for "emergency ambulance services" that

"encompasses all services rendered by emergency ambulances." *Id.* at 390. It did not limit the scope of the statute to the provision of advanced life support services.

Schaefer's involved an ambulance company that provided non-emergency interfacility transfers at a BLS level of service outside of its own exclusive operating area. Schaefer's argued that it was entitled to perform these transfers because in its view "all interfacility transfers constitute nonemergency ambulance services," *id.* at 389, and thus fall outside the EMS Act's exclusive operating area scheme. San Bernardino County argued to the contrary, asserting that all interfacility transfers made by an "emergency ambulance," which it defined as an ambulance staffed and equipped to provide at least BLS service, constitute "emergency ambulance services." *Id.* The court agreed with the county, citing with approval our decision in *A-1 Ambulance*. Just as we had there held that ALS refers to the level of service available in an ambulance, not the needs of the patient being transported, the California Court of Appeal held that an "emergency ambulance" is one capable of providing a particular level of service, whether or not the patient is transported in an emergency situation. *Id.* at 390; *see A-1 Ambulance*, 90 F.3d at 336.

[4] The reasoning of the *Schaefer's* decision materially undercuts Redwood's position here. First, *Schaefer's* concluded that "emergency ambulances" can perform non-emergency interfacility transfers within an exclusive operating area under the EMS Act. Second, noting that the EMS Act does not define "emergency ambulance services," *Schaefer's* implicitly accepted that an "emergency ambulance" provides at least a BLS level of service. Therefore, the court held that a county can establish an exclusive operating area within which the exclusive operator provides non-emergency BLS ambulance services.

[5] In addition, the *Schaefer's* court agreed with policy arguments similar to those offered by Sonoma County in sup-

port of its position here. The court observed that the EMS Act contemplates a regulatory "deal" in which an exclusive operator receives protection from competition in profitable, populous areas of a county in exchange for the obligation to serve unprofitable, sparsely populated areas. *See Schaefer's*, 80 Cal. Rptr. 2d at 391 (quoting *Valley Med. Transport, Inc. v. Apple Valley Fire Protection Dist.*, 952 P.2d 664, 671 (Cal. 1998)). As part of this deal, the EMS Act permits exclusive operators to perform non-emergency services that provide a stable source of income to offset the less predictable income derived from 911 responses. "If interfacility transfers were deemed nonemergency ambulance services, outside providers could invade an exclusive operating area and 'cherry-pick' this income." *Id.* The court concluded that the California Legislature drafted the EMS Act to serve as a prophylactic measure against such "cherry-picking" by permitting "emergency ambulances" and providers of ALS to perform non-emergency interfacility transfers.

[6] The *Schaefer's* court also adopted the argument, advanced here by Sonoma County, that carving out interfacility transfers from an exclusive operating area "would pose serious enforcement problems." *Id.* The court observed that allowing non-exclusive operators to provide ambulance services in non-emergency situations would require a particularized evaluation of a patient's medical needs before each ambulance run. The court reasoned that the Legislature wanted to avoid this undesirable result and thus authorized that the scope of an exclusive operating area depend on the "nature of the ambulance providing the services." *Id.*

[7] Applying the principles of *A-1 Ambulance* and *Schaefer's*, we conclude that Sonoma County's ordinances and its contract with Sonoma Life Support are protected by state action immunity. Because Sonoma Life Support provides ALS service, it is entitled to exclusively perform non-emergency interfacility transfers at an ALS level of service under our decision in *A-1 Ambulance*. Moreover, because

Sonoma Life Support provides "emergency ambulance services," it is entitled to exclusively perform non-emergency interfacility transfers requiring an emergency ambulance, which encompasses a BLS level of service, under the decision in *Schaefer's*. Accordingly, we vacate the district court's injunction because the County has permissibly established an exclusive operating area for all "emergency ambulance services."

II.

[8] Redwood alternatively contends that even if the California courts have disagreed with its interpretation of state law, we are not bound by state law in determining the scope of state action immunity. Redwood relies on this court's decision in *Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1997), where we held that a state public utility commission failed to confer state action immunity on two private utilities that attempted to allocate service territories in Portland, Oregon, because the commission did not clearly express its intent to create exclusive operating areas or to displace competition between the companies. *Id.* at 1436-37. In *Columbia Steel*, we concluded that the commission's approval of an exchange of properties between the two utilities did not satisfy the threshold test for state action immunity established in *Parker*. Here, in contrast, we find in the EMS Act a clearly expressed state policy to create exclusive operating areas for emergency ambulance services. *See* Cal. Health & Safety Code §§ 1797.6, 1797.85.

[9] Redwood also contends that the EMS Act does not clearly articulate an intent to confer state action immunity on exclusive operating areas for non-emergency BLS ambulance services. Redwood reasons that § 1797.85 does not expressly include basic life support services, but refers only to "emergency ambulance services" and "providers of advanced life support." Redwood's argument is foreclosed by the Supreme Court's decision in *Town of Hallie v. City of Eau*

Claire, 471 U.S. 34 (1985). In *Town of Hallie*, the Court held that a state legislature need not explicitly authorize a municipality to engage in anticompetitive conduct to confer antitrust immunity. Rather, the state legislature satisfies the "clear articulation" requirement when the logical and foreseeable result of a statute is to displace competition either with regulation or monopoly. *Id.* at 42-43. Relying on *Town of Hallie*, this court has concluded that "[v]irtually any anti-competitive effect . . . would appear to be well within" the EMS Act's contemplation. *Mercy-Peninsula*, 791 F.2d at 758. We also have recognized that the EMS Act has the foreseeable effect of excluding some providers from a local EMS system. *See id.*

Finally, Redwood argues that the panel should affirm the injunction because the County's Board of Supervisors, not the EMS agency, created the exclusive operating area. *See Memorial Hosp. Ass'n v. Randol*, 45 Cal. Rptr. 2d 547 (1995). The County points out that Redwood raised this issue for the first time on appeal and therefore we should not consider it. The *A-1 Ambulance* court was presented with the same claim. We noted that "as it appears not to be a purely legal issue," we would not consider the issue on appeal when it was abandoned by plaintiff at trial. *A-1 Ambulance*, 90 F.3d at 337 n.3. Sonoma County argues that it established the exclusive operating area by adopting the recommendation of the EMS agency, a method it contends is permissible under *Randol*. Because the County has demonstrated that this issue turns on the resolution of disputed facts, we do not reach it.

Because Redwood is no longer the "prevailing party," we vacate the district court's award of costs and fees to Redwood in the amount of $47,243.25. *See* 15 U.S.C. § 26; Fed. R. Civ. P. 54(d).

The judgment is REVERSED AND INJUNCTION VACATED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED DECEMBER 22, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C 91 1665 VRW

REDWOOD EMPIRE LIFE SUPPORT, a corporation,
STANLEY P. CANTOR,

Plaintiffs,

vs.

THE COUNTY OF SONOMA, CALIFORNIA, THE SONOMA COUNTY EMERGENCY MEDICAL SERVICES

Appendix B

AGENCY, MARK A KOSTIELNEY, 911 EMERGENCY SERVICES, INC. dba SONOMA LIFE SUPPORT

Defendants.

JUDGMENT

This action came on for trial before the Court, Honorable Vaughn R. Walker, District Judge, presiding. The issues having been duly tried, and a decision having been rendered by order dated August 12, 1996, judgment pursuant to F.R.C.P. 54(b) was entered on August 12, 1996. Thereafter, by order dated October 23, 1996, the Court granted plaintiff Redwood Empire Life Support's timely motion pursuant to F.R.C.P. 59 and vacated its judgment of August 12, 1996.

The Court now having fully considered additional post-trial briefing and oral argument on specific issues identified in its order of October 23, 1996, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Redwood Empire Life Support, a California corporation, have judgment against the defendants The County of Sonoma, California, The Sonoma County Emergency Medical Services Agency, and 911 Emergency Services Inc. dba Sonoma Life Support, on said plaintiff's Sherman Act antitrust claim (15 U.S.C. §§ 1, 15 and 26) as follows:

1. Said defendants, their officers, agents, servants, employees and attorneys, and all those in active concert or participation with them, are hereby

permanently restrained and enjoined from contractually granting, or otherwise maintaining or enforcing, a contractually granted exclusive operating zone or zones in an emergency medical service area or subarea within the jurisdiction of the Sonoma County Emergency Medical Services Agency, which prevents plaintiff Redwood Empire Life Support, or others similarly situated, from providing, at the request of any physician or medical facility requesting same on behalf of a patient under the medical care and attention of such physician or medical facility, non-emergency ambulance services at a basic life support level of service that does not involve provision by an EMT-P or EMT-II of an advanced life support or limited advanced life support level of service as such levels of service are defined by or pursuant to California Health & Safety Code §§ 1797.52 and 1797.92 respectively.

2. Plaintiff Redwood Empire Life Support is entitled to its legally recoverable costs of suit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Mark A. Kostielney have judgment against plaintiff Redwood Empire Life Support, a California corporation, upon plaintiff's 42 U.S.C. 1983 claim(s) against said defendant. Said defendant Mark A. Kostielney is entitled to his costs of suit actually incurred.

Dated:

s/ Vaughn R. Walker
VAUGHN R. WALKER
UNITED STATES DISTRICT JUDGE

APPENDIX C — CALIFORNIA "EMS ACT" (SELECTED STATUTES)

HEALTH AND SAFETY CODE

DIVISION 2.5. EMERGENCY MEDICAL SERVICES

CHAPTER 1. GENERAL PROVISIONS

1797.1. The Legislature finds and declares that it is the intent of this act to provide the state with a statewide system for emergency medical services by establishing within the Health and Welfare Agency the Emergency Medical Services Authority, which is responsible for the coordination and integration of all state activities concerning emergency medical services.

* * *

1797.5. It is the intent of the Legislature to promote the development, accessibility, and provision of emergency medical services to the people of the State of California.

Further, it is the policy of the State of California that people shall be encouraged and trained to assist others at the scene of a medical emergency. Local governments, agencies, and other organizations shall be encouraged to offer training in cardiopulmonary resuscitation and lifesaving first aid techniques so that people may be adequately trained, prepared, and encouraged to assist others immediately.

1797.6. (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that

achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this section and Sections 1797.85 and 1797.224 to prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under this division.

* * *

CHAPTER 2. DEFINITIONS

* * *

1797.52. "Advanced life support" means special services designed to provide definitive prehospital emergency medical care, including, but not limited to, cardiopulmonary resuscitation, cardiac monitoring, cardiac defibrillation, advanced airway management, intravenous therapy, administration of specified drugs and other medicinal preparations, and other specified techniques and procedures administered by authorized personnel under the direct supervision of a base hospital as part of a local EMS system at the scene of an emergency, during transport to an

acute care hospital, during interfacility transfer, and while in the emergency department of an acute care hospital until responsibility is assumed by the emergency or other medical staff of that hospital.

* * *

1797.60. "Basic life support" means emergency first aid and cardiopulmonary resuscitation procedures which, as a minimum, include recognizing respiratory and cardiac arrest and starting the proper application of cardiopulmonary resuscitation to maintain life without invasive techniques until the victim may be transported or until advanced life support is available.

* * *

1797.70. "Emergency" means a condition or situation in which an individual has a need for immediate medical attention, or where the potential for such need is perceived by emergency medical personnel or a public safety agency.

1797.72. "Emergency medical services" means the services utilized in responding to a medical emergency.

1797.74. "Emergency medical services area" or "EMS area" means the geographical area within the jurisdiction of the designated local EMS agency.

1797.76. "Emergency medical services plan" means a plan for the delivery of emergency medical services

consistent with state guidelines addressing the components listed in Section 1797.103.

1797.78. "Emergency medical services system" or "system" means a specially organized arrangement which provides for the personnel, facilities, and equipment for the effective and coordinated delivery in an EMS area of medical care services under emergency conditions.

* * *

1797.85. "Exclusive operating area" means an EMS area or subarea defined by the emergency medical services plan for which a local EMS agency, upon the recommendation of a county, restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support.

* * *

1797.94. "Local EMS agency" means the agency, department, or office having primary responsibility for administration of emergency medical services in a county and which is designated pursuant to Chapter 4 (commencing with Section 1797.200).

* * *

Appendix C

CHAPTER 3. STATE ADMINISTRATION

Article 1. The Emergency Medical Services Authority

1797.100. There is in the state government in the Health and Welfare Agency, the Emergency Medical Services Authority.

* * *

1797.105. (a) The authority shall receive plans for the implementation of emergency medical services and trauma care systems from EMS agencies. . . .

* * *

1797.107. The authority shall adopt, amend, or repeal, . . . such rules and regulations as may be reasonable and proper to carry out the purposes and intent of this division and to enable the authority to exercise the powers and perform the duties conferred upon it by this division not inconsistent with any of the provisions of any statute of this state.

* * *

CHAPTER 4. LOCAL ADMINISTRATION

Article 1. Local EMS Agency

1797.200. Each county may develop an emergency medical services program. Each county developing such a

program shall designate a local EMS agency which shall be the county health department, an agency established and operated by the county, an entity with which the county contracts for the purposes of local emergency medical services administration, or a joint powers agency created for the administration of emergency medical services by agreement between counties or cities and counties pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.

* * *

1797.204. The local EMS agency shall plan, implement, and evaluate an emergency medical services system, in accordance with the provisions of this part, consisting of an organized pattern of readiness and response services based on public and private agreements and operational procedures.

1797.206. The local EMS agency shall be responsible for implementation of advanced life support systems and limited advanced life support systems and for the monitoring of training programs.

* * *

1797.220. The local EMS agency, using state minimum standards, shall establish policies and procedures approved by the medical director of the local EMS agency to assure medical control of the EMS system. The policies and procedures approved by the medical director may require basic life support emergency medical transportation services to meet any medical control requirements including dispatch,

patient destination policies, patient care guidelines, and quality assurance requirements.

* * *

1797.222. A county, upon the recommendation of its local EMS agency, may adopt ordinances governing the transport of a patient who is receiving care in the field from prehospital emergency medical personnel, when the patient meets specific criteria for trauma, burn, or pediatric centers adopted by the local EMS agency.

The ordinances shall, to the extent possible, ensure that individual patients receive appropriate medical care while protecting the interests of the community at large by making maximum use of available emergency medical care resources. These ordinances shall be consistent with Sections 1797.106, 1798.100, and 1798.102, and shall not conflict with any state regulations or any guidelines adopted by the Emergency Medical Service Authority.

This section shall not be construed as prohibiting the helicopter program of the Department of the California Highway Patrol from a role in providing emergency medical services when the best medically qualified person at the scene of an accident determines it is in the best interests of any injured party.

* * *

1797.224. A local EMS agency may create one or more exclusive operating areas in the development of a local plan,

if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. No competitive process is required if the local EMS agency develops or implements a local plan that continues the use of existing providers operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981. A local EMS agency which elects to create one or more exclusive operating areas in the development of a local plan shall develop and submit for approval to the authority, as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. This plan shall include provisions for a competitive process held at periodic intervals. Nothing in this section supersedes Section 1797.201.

* * * *

APPENDIX D — STATUTORY HISTORY, "EMS AREA" DEFINITION

Senate Bill No. 125
Chapter 1260

(Approved by Governor September 27, 1980. Filed with Secretary of State September 29, 1980)

* * *

1797.74 "Emergency medical services area" or "EMS area" means the geographical area of a county or a health service are previously designated pursuant to the National Health Planning and Resources Development Act of 1974 (42 U.S.C. 300k et seq., P.L. 93-641).

* * *

Senate Bill No. 1124
Chapter 1391

(Approved by Governor September 25, 1984. Filed with the Secretary of State September 26, 1984)

* * *

1797.74 "Emergency medical services area" or "EMS area" means geographical area within the jurisdiction of the designated local EMS agency.

* * * *

APPENDIX E — LEGISLATIVE HISTORY AB 3153, AS INTRODUCED

California Legislature — 1983-84 Regular Session
ASSEMBLY BILL No. 3153
Introduced by Assembly Member Bronzan
February 15, 1984

An act to add Section 1797.85 to the Health and Safety Code, relating to emergency medical services.

LEGISLATIVE COUNSEL'S DIGEST

AB 3153, as introduced, Bronzan. Emergency Medical Services

Under existing law, the Emergency Medical Service Authority in the Health and Welfare Agency has been assigned various responsibilities with respect to the methods employed in providing emergency medical services.

This bill would state the intent of the Legislature with respect to the degree of state direction and supervision over emergency medical services. The bill would also define "exclusive operating area" for purposes of those services.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that

achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40, 70 L.Ed.2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this act at the 1983/84 Regular Session of the Legislature, to prescribe and exercise the degree of state direction and supervision over emergency medical services as will preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

SEC. 2. Section 1797.85 is added to the Health and Safety Code, to read:

1797.85. "Exclusive operating area" means a subarea of an EMS area or subarea defined by the emergency medical services plan for which a county grants an exclusive operating permit to an emergency ambulance service or provider of limited advanced life support or advanced life support.

* * * *

APPENDIX F — LEGISLATIVE HISTORY
AB 3153, AS FIRST AMENDED

AMENDED IN ASSEMBLY APRIL 24, 1984
California Legislature — 1983-84 Regular Session
ASSEMBLY BILL No. 3153
Introduced by Assembly Member Bronzan
February 15, 1984

An act to add Section ~~1797.85~~ *Sections 1797.6, 1797.85, and 1797.224* to the Health and Safety Code, relating to emergency medical services.

LEGISLATIVE COUNSEL'S DIGEST

AB 3153, as introduced, Bronzan. Emergency Medical Services

Under existing law, the Emergency Medical Service Authority in the Health and Welfare Agency has been assigned various responsibilities with respect to the methods employed in providing emergency medical services.

This bill would state the intent of the Legislature with respect to the degree of state direction and supervision over emergency medical services. The bill would *permit a local emergency medical services agency to grant an exclusive operating permit to an emergency ambulance service or provider of limited advance life support or advance life support within exclusive operating areas, as specified, and would* also define "exclusive operating area" for purposes of those ~~services~~ *provisions*.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated.

Appendix F

The people of the State of California do enact as follows:

SECTION 1. Section 1797.6 is added to the Health and Safety Code, to read:

1797.6 (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40, 70 L.Ed.2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this act ~~at the 1983/84 Regular Session of the Legislature, to~~ *section and Sections 1797.85 and 1797.224 to* prescribe and exercise the degree of state direction and supervision over emergency medical services as will preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed ~~functions under Division 2.5 (commencing with Section 1797) of the Health and Safety Code.~~ *function under this division.*

SEC. 2. Section 1797.85 is added to the Health and Safety Code, to read:

1797.85. "Exclusive operating area" means ~~a subarea of~~ an EMS area or subarea defined by the emergency medical services plan for which a ~~county grants an exclusive~~ *local*

Appendix F

EMS agency, upon the recommendation of a county, grants an exclusive operating permit to an emergency ambulance service or provider of limited advanced life support or advanced life support.

SEC. 3. Section 1797.224 is added to the Health and Safety Code, to read:

1797.224. A local EMS agency may grant an exclusive operating permit to an emergency ambulance service or provider of limited advanced life support or advanced life support, provided that a competitive process is utilized to select providers within exclusive operating areas. A local EMS agency which elects to establish exclusive operating areas and to select exclusive providers within those areas shall develop and submit for approval to the authority, as part of the local EMS plan its process for defining exclusive operating areas and selecting providers. This plan shall include provisions for a competitive process held at periodic intervals, Nothing in this section shall supersede Section 1797.201.

* * * *

APPENDIX G — AB 3153, AS FILED

CHAPTER 1349
p. 566
1984 REGULAR SESSION.

CHAPTER 1349
ASSEMBLY BILL No. 3153

An act to add Sections 1797.6, 1797.85, and 1797.224 to the Health and Safety Code, relating to emergency medical services.

[approved by Governor September 25, 1984. Filed with Secretary of State September 26, 1984.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3153, as introduced, Bronzan. Emergency Medical Services

Under existing law, the Emergency Medical Service Authority in the Health and Welfare Agency has been assigned various responsibilities with respect to the methods employed in providing emergency medical services.

This bill would state the intent of the Legislature with respect to the degree of state direction and supervision over emergency medical services. The bill would permit a local emergency medical services agency to create one or more exclusive operating areas, as defined in the development of a local plan. If a local EMS agency elects to create one or more exclusive operating areas, it would be required to submit specified material to the authority for approval.

Appendix G

The bill would prohibit the fact of its enactment or any of the provisions which it would from being considered, used, or applied in any litigation pending on January 1, 1985.

The people of the State of California do enact as follows:

SECTION 1. Section 1797.6 is added to the Health and Safety Code, to read:

§ 1797.6 (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40, 70 L.Ed.2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this section and Sections 1797.85 and 1797.224 to prescribe and exercise the degree of state direction and supervision over emergency medical services as to preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under this division.

SEC. 2. Section 1797.85 is added to the Health and Safety Code, to read:

§ 1797.85. "Exclusive operating area" means an EMS area or subarea defined by the emergency medical services plan

for which a local EMS agency, upon the recommendation of a county, restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support.

SEC. 3. Section 1797.224 is added to the Health and Safety Code, to read:

§ 1797.224. A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. No competitive process is required if the local EMS agency develops or implements a local plan that continues the use of existing providers operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981. A local EMS agency which elects to create one or more exclusive operating areas in the development of a local plan shall develop and submit for approval to the authority, as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. This plan shall include provisions for a competitive process held at periodic intervals. Nothing in this section supersedes Section 1797.201.

SEC. 4. Neither the fact of the enactment of this act, nor any of the provisions of Sections 1797.6, 1797.85, or Section 1797.224 of the Health and Safety Code, as added by this act, shall be considered, used, or applied in any litigation which is pending on January 1, 1985.

* * * *

APPENDIX H — EXCERPTS FROM SONOMA COUNTY ORDINANCES

Ordinance No. 4386. (1991)

Section 28-3 Definition

* * *

c) *Ambulance.* Any privately or publicly owned vehicle specially designed, constructed, modified or equipped, and used for responding to emergency calls, as defined herein, the purpose of transporting sick, injured, convalescent, infirm, or otherwise incapacitated persons.

* * *

Section 28-21 Ambulance Service Franchise Agreements.

a) *Exclusive Operating Areas.* The local EMS Agency shall provide for ambulance services under a local plan which creates one or more exclusive operating areas. A competitive process shall be utilized at periodic intervals to select the provider(s) of EMS for each exclusive operating area.

* * *

Ordinance No. 4435. (1995)

Section I. The Board finds that confusion has arisen over the scope of regulation intended by Ordinance No. 4386. Specifically, the Board is informed that ambulance service providers are uncertain as to the effect of Ordinance No.

4386 on the provision of Advanced Life Support. These amendments to Ordinance No. 4386 are intended to eliminate ambiguity as to the Board's original intent to regulate all ALS services. These amendments are declarative of existing law.

* * *

Sec. 28-3 Definitions

* * *

c) *Ambulance.* Any privately or publicly owned vehicle specially designed, constructed, modified or equipped, and used for responding to emergency calls, providing Advanced Life Support services, as defined herein, for the purpose of transporting sick, injured, convalescent, infirm, or otherwise incapacitated persons.

* * *

Sec. 28-21 Ambulance Service Franchise Agreements.

a) *Exclusive Operating Areas.* The local EMS Agency shall provide for Emergency, LALS and ALS ambulance services under a local plan which creates one or more exclusive operating areas. A competitive process shall be utilized at periodic intervals to select the provider(s) of EMS for each exclusive operating areas.

* * * *

APPENDIX I — REPORT ON MEDICARE AMBULANCE PAYMENTS BY THE OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DATED NOVEMBER, 1997

Department of Health and Human Services

OFFICE OF
INSPECTOR GENERAL

MEDICARE AMBULANCE PAYMENTS

JUNE GIBBS BROWN
Inspector General

NOVEMBER 1997
OEI-05-95-00300

EXECUTIVE SUMMARY

PURPOSE

To determine whether Medicare reimbursement policies and levels of payment for ambulance services are prudent.

BACKGROUND

From 1987 through 1995, Medicare expenditures for ambulance services have more than tripled. In 1987, Medicare allowed charges for ambulance services amounted to slightly more than $600 million. In 1995, carriers paid nearly $2 billion to ambulance providers.

Medicare pays for medically necessary ambulance services when the use of other methods of transportation would

endanger the patient's health. Two levels of service, advanced life support (ALS) and basic life support (BLS), are covered by Medicare. Reimbursement is based on the type of vehicle and personnel used (ALS or BLS) and the service status (emergency or non-emergency).

FINDINGS

Medicare payments for ambulance services appear to lack common sense.

In 26 States, Medicare pays more for routine, non-emergency basic life support transportation than it does for advance life support emergency transportation. The difference, in some areas, is more than $200. In 18 States, Medicare pays more for BLS emergency transports without supplies than with supplies. Similar anomalies exist in ALS base rates. In 1995, the modal allowed charge for basic life support mileage was $9.25 a mile, more than twice the allowed charge for advance life support vehicles and seven times greater than the cost of a gallon of fuel.

Ambulance payment policies are vulnerable to fraud and abuse.

Carriers police a significant number of ambulance claims. The complexity of the current system enables transportation suppliers to bill for ALS services when BLS services are provided; misrepresent the patient's true medical condition; and, avoid carrier program safeguards. Carriers report wide spread abusive situations involving unnecessary transports, oxygen, EKGs and other services. Over the past 5 years, the

Office of Inspector General has had more than 100 convictions involving ambulance suppliers.

Problems are the result of extremely complex payment methods and inconsistent policies.

A complex payment system encourages fraud and abuse and thwarts efforts to control expenditures. This complexity stems from a payment system that uses four different billing methods, recognizes BLS and ALS vehicles, distinguishes emergency and non-emergency transports, employs more than 240 different procedure codes and uses more than 35 fiscal agents. Payment levels to ambulance providers are not based on the actual cost of providing services within geographic areas.

Carrier interpretations of policy contribute to variance in payments and coverage. In 16 States the carrier considers payment for oxygen included in the BLS base rate. Other carriers consider oxygen to be a prescription drug and allow ambulance suppliers to bill using a separate procedure code. Policy differences also exist with regard to EKGs, supplies, injections and other services provided during transport.

RECOMMENDATIONS

The Health Care Financing Administration's (HCFA's) well-intentioned efforts to limit ambulance companies to four billing methods using 37 procedure codes has been circumvented by idiosyncrasies of the current reasonable charge payment methodology and the fee-for-service system. At a time when most Medicare Part B services are being

paid on a fee schedule, ambulance services are among the few services the Medicare program still reimburses on a reasonable charge basis.

Tremendous variation in payments indicates that Medicare reimbursement in many areas may be too high. The reasonable charge payment mechanism has resulted in inflated charges for ambulance services and does not accurately reflect the real cost of doing business in an area. More importantly, the reasonable charge payment method and the fee-for-service system provide little or no incentive for providers to control costs. Efforts to control expenditures in the fee-for-service system often results in fragmentation of services and increased utilization. Extensive carrier reviews of ambulance claims adds to program costs. Fraud and abuse in this area has also been well documented.

We believe that the vulnerabilities we found need to be addressed as soon as possible. We recommend that HCFA:

- seek legislative authority to develop a fee schedule for ambulance transportation.

In doing so, HCFA should take into consideration the competitive prices available in an area including the negotiated rates that exist between managed care entities/ hospitals and ambulance providers. A fee schedule could also take into account the cost of doing business in an area, economies of scale available to providers, adjustments for local subsidies and other considerations that may affect the cost of doing business.

Appendix I

The following interim steps should be taken to help develop the fee schedule:

- Instruct carriers to examine the inherent reasonableness of current allowable charges and adjust them as necessary.

- Work with the ambulance industry to develop clearer guidelines as to what is or is not included in the base rate and what mileage is intended to cover.

- Eliminate separate payments for oxygen, supplies, injectables and other services such as EKGs. These items should be included in the base rate.

- Limit the number of procedure codes available to ambulance suppliers for billing. At a minimum, restrict use of procedure codes to the 37 specific codes designated for ambulance transportation.

We believe that Medicare ambulance policies could be simplified and that unreasonable base rate and mileage payment levels could be reduced. Consistent coverage policies should be developed and the number of billing methods and procedure codes currently in use reduced. Elimination of many procedure codes would discourage unbundling and the routine use of some supplies and services designed simply to enhance payment. Items considered essential for life support should be included in base rate reimbursement and should not be paid as separate items or services.

Appendix I

Actual savings from simplification and more uniform policies would depend on how base rate and mileage are defined and the fee schedule allowances for these services. If implemented, as we have suggested, we project that Medicare could save at least $242 million annually. Fifty million dollars of these projected savings could be derived solely from elimination of separate payments for oxygen, supplies, injectables and other services such as EKGs. At least $192 million could be saved annually by limiting the allowed charge for mileage to the lower of actual charge or $1 per mile.

Our savings projections are predicated on the current base rate levels remaining unchanged except for increases due to the inflation index charge or changes in customary and prevailing charges. Actual savings could be higher if the base rate allowed charge for non-emergency transportation is adjusted to ensure that Medicare pays the same or less for this service than it does for the base rate for emergency transportation. Structuring payments to take into account average miles per gallon, bulk purchasing discounts, State and local taxes and other factors could also impact projected savings. Savings may be lower if some base rates are increased or policies developed that permit unbundling of some services.

AGENCY COMMENTS

Since issuing our draft report, Congress passed the Balanced Budget Act of 1997. This legislation implements our recommendation and requires that HCFA establish a fee schedule for Medicare ambulance payments. We look forward to HCFA's regulation that will carry out the legislation.